91-540

NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

THOMAS JAMES CHANCE,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED

1. Did the South Carolina Supreme Court err in holding that *Baldasar v. Illinois*, 446 U.S. 222 (1980) allowed a prior guilty plea, at which the petitioner was not represented by counsel and did he waive his right to counsel, to be used to require the trial judge to enhance the punishment for the petitioner for his present conviction of driving under the influence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

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Petitioner, Thomas James Chance, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of South Carolina entered on April 8, 1991.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is reported at 405 S.E.2d 375 (S.C. 1991) and is

reprinted at Appendix A at page 1. The Order denying a rehearing is reprinted at Appendix B at page 5.

JURISDICTION

The judgement of the Supreme Court of the State of South Carolina was entered on April 8, 1991 and a timely petition for rehearing was denied on July 3, 1991. The jurisdiction of this Court arises under 28 U.S.C. §1257(a).

STATUTE INVOLVED

The driving under the influence statute for the State of South Carolina is found in South Carolina Code of Laws §56-5-2930 *et. seq.* The specific provision involved in this case is §56-5-2940(2) and reads as follows:

> (2) By a fine of not less than two thousand dollars nor more than five thousand dollars and imprisonment for not less than forty-eight hours nor more than one year for the second offense. However, the fine imposed by this item may not be suspended in an amount less than one thousand dollars. In lieu of service of imprisonment the court may require that the individual complete an appropriate term of public service employment of not less than ten days upon terms and conditions the court considers proper.

STATEMENT OF THE CASE

The petitioner was arrested on June 18, 1989 and charged with driving under the influence. He had a prior offense

tried in the court of the magistrate on March 29, 1980.[1] The petitioner did not contest the fact that he was guilty of driving under the influence on June 18, 1989. His sole point of contention was that his offense should have been treated as a first offense because he was unrepresented by counsel at his prior conviction and he did not knowingly and intelligently waive his right to counsel. The state and the defendant stipulated at trial that the defendant did not have an attorney at the prior trial nor did he waive his right to counsel. (Tr. at 13). This finding was accepted by the South Carolina Supreme Court. *State v. Chance*, 405 S.E. at 375, (Appendix at 2)

The South Carolina Supreme Court, in a divided opinion, affirmed the conviction of the petitioner for a second offense driving under the influence by holding that *Baldasar v. Illinois*, 446 U.S. 222 (1980) does not apply if the "defendant was not actually incarcerated for a prior uncounselled misdemeanor . . . ." *State v. Chance*, 405 S.E.2d at 376. (Appendix at 3)

The petitioner raised the issue of the constitutionality of using a prior uncounselled guilty plea to enhance his punish-

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[1] Under South Carolina law, a defendant charged with driving under the influence first offense is entitled to a jury trial.

ment on page 11 of the transcript of record. That portion of the transcript is reprinted at Appendix C at page 7.

REASONS FOR GRANTING THE WRIT

A. **The use of a prior uncounselled guilty plea to require a trial judge to enhance the present sentence of the petitioner violates the right of the petitioner to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.**

Since this Court decided *Baldasar v. Illinois*, 446 U.S. 222 (1980), state courts have varied their interpretation of the decision. Some states have interpreted it to mean that no prior uncounselled guilty plea can be used to enhance the punishment of a defendant. *See, e.g., Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *State v. Laurick*, 120 N.J. 1, 575 A.2d 1340 (1990); *State v. Vares*, 801 P.2d 555 (Haw. 1990); *State v. Oehm*, 9 Kan. App. 2d 399, 680 P.2d 309 (1984); State v. Dowd, 478 A.2d 671 (Me. 1984); *State v. Wiggins*, 399 So.2d 206 (La. 181);[2] *People v. Stratton*, 148 Mich.App. 70, 384 N.W.2d 83 (1986); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983); *State v. Ulibarri*, 96

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[2] The Louisiana Supreme Court anticipated the decision of this Court in *Baldasar* when it decided *City of Monroe v. Fincher*, 305 So.2d 108 (La. 1974).

N.M.2d 511, 632 P.2d 746 (1981); *City of Pendleton v. Standefer*, 297 Or. 725, 688 P.2d 68 (1984); *Sargent v. Commonwealth*, 5 Va. App. 143, 360 S.E.2d 895 (1987); *State v. Armstrong*, 332 S.E.2d 837 (W. Va. 1985).

Other states have allowed the use of a prior uncounselled guilty plea to enhance punishment, but the reasons for the decisions are almost as numerous as the decisions. *See, e.g. State v. Chance*, 405 S.E.2d 375 (S.C. 1991)(prior plea may be used if defendant was not incarcerated at prior plea); *State v. Orr*, 375 N.W.2d 171 (N.D. 1985);[3] *Hlad v. State*, 762 S.2d 762 (Fla. 5th DCA 1990)(prior uncounselled plea can be used unless prior offense subjected defendant to more than six months imprisonment); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983); *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989)(prior plea can be used unless defendant was indigent or misconduct of the state caused counsel to be unavailable to defendant); *Sheffield v. City of Pass Christian*, 556 So.2d 1052 (Miss. 1990)(*Baldasar* does not establish a rule); *Moore v. State*, 181 Ga. App. 548, 352 S.E.2d 821 (1987)(*Baldasar* applies only

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[3] The North Dakota Supreme Court while limiting the application of *Baldasar*, held that a prior uncounselled guilty plea violated the North Dakota state constitution.

if prior uncounselled plea is used to enhance subsequent conviction to a felony); Commonwealth v. Thomas, 510 Pa. 106, *507 A.2d 57 (1986); State v. Novak*, 107 Wis.2d 31, 318 N.W. 364 (1982).

The decisions of the District Courts of Appeals of Florida illustrate the confusion. For example, the Fifth District in *Hlad v. State*, 565 So. 2d 762 (Fla. 5th DCA 1990) has held that *Baldasar* does not apply because the defendant was not subjected to a term of imprisonment of more than six months. The First District in *Harrell v. State*, 469 So.2d 169 (Fla. 1st DCA 1990) held that *Baldasar* does prohibit the use of an uncounselled guilty plea even if the defendant was subjected to less than six months imprisonment.

In *People v. Stratton*, 148 Mich. App. 70, 384 N.W.2d 83 (1985) the Michigan Court of Appeals said "[a]s the case law now stands, two conclusions are obvious: first, the Supreme Court has not provided a definitive answer to the question presented in *Baldasar* and, second the lower federal courts have not come to agreement on the rationale to follow in cases since *Baldasar*. Given this state of the federal law, our state courts may 'feel free to choose the view which seems most appropriate

to us.'" *Id.* at 78, 384 N.W.2d at 87.

The South Carolina Supreme Court erred in holding that the prior uncounselled guilty plea can be used to enhance the punishment in a subsequent case. In so holding, the South Carolina Supreme Court ruled, "we hold when a defendant is not actually incarcerated for a prior uncounselled misdemeanor, that offense may be used for enhancement." *State v. Chance*, 405 S.E.2d at 376 (Appendix at 3). The validity of a prior plea should not depend on post plea events. If Thomas Chance had been sentenced to just one day in jail at his prior plea, then, according to the South Carolina Supreme Court, the prior plea would not have been valid for enhancement purposes. Such a rule is illogical.

The state has made the choice to use prior convictions to require a trial judge to punish this and other defendants more severely for second and subsequent offenses. The state, as well as the defendant, should have a common desire to assure that a second and subsequent offender is in fact such an offender. Requiring that the state show that a defendant either had an attorney at the prior sentencing or that he waived his right to an attorney will not always assure that the defendant was properly

convicted, but will increase the probability that the conviction was in fact proper. The criminal justice system cannot achieve perfection. It can, however, be required to strive toward that goal.

Cases which are handled in magistrate's court without an attorney frequently result in a plea not because the defendant is guilty, but because a plea appears to the defendant to be the cheapest or easiest thing for the defendant to do at the time. A defendant, without consulting an attorney, cannot be assumed to know whether his constitutional rights were protected, he has a valid defense, or whether all evidence would be admissible. To assume otherwise is to assume all the public is as knowledgeable of the law as attorneys. While hindsight might prove it was not the cheapest or easiest thing to do, the fact remains that the plea is a fait accompli.

The importance of the constitutional guarantee of an attorney to assist a defendant at trial is to assure that the trial does not result in an erroneous conviction. That was the basic holding of this Court in *Gideon v. Wainwright*, 372 U.S. 335

(1963).[4] As this Court has said, a defendant "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1982). The test is not whether a plea is valid for some purposes but not for others. The test is whether a conviction which resulted from the defendant not having counsel and not waiving that right is sufficiently reliable to be used to enhance the punishment of the defendant for second and subsequent offenses. The burden upon the state is minimal if the state knows that before a conviction can be used to require a trial judge to enhance a punishment, the state must provide the accused with counsel or obtain a waiver of that right.

The State of South Carolina, if it desired, could have set the maximum punishment for a first offense of driving under the influence at five years imprisonment.[5] Under such a sentenc-

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[4] The *Gideon* case itself is probably the best example of why each defendant should have an attorney. At his trial, with the assistance of counsel, Clarence Gideon was found not guilty.

[5] Under South Carolina law, the maximum punishment for a fourth or subsequent offense for driving under the influence is five years imprisonment. *See*, S. C. Code (1976) § 56-5-2940(4).

ing scheme, a trial judge would be free to accept or reject, in his discretion, the use of any prior conviction. If the defendant could convince the trial judge that he did not have an attorney at a prior trial or plea, the trial judge would be free to treat him as a first offender.[6] Under the present sentencing structure, the trial judge is required by law to increase the sentence with each subsequent conviction. Thus, the state should bear the obligation of proving, at a minimum, that any prior plea or conviction was obtained with the assistance of counsel or that such right was properly waived.

The burden on the state of proving the defendant either had an attorney or waived his right to counsel is minimal. All that would be required is for the state to provide a form for the defendant to sign naming his attorney or having the defendant sign a waiver of his right to counsel. *See*, *Sargent v. Commonwealth*, 5 Va. App. 143, 360 S.E.2d 895 (1987). The retention of such a simple record would not place too great a burden upon the state in exchange for the right to enhance the punishment for second and subsequent offense.

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[6] Such a punishment would also assure that each defendant would have an attorney and that each subsequent conviction could be used to enhance the punishment of the defendant.

CONCLUSION

This Court should grant the Writ of Certiorari to eliminate the conflict and confusion among the various states as to the correct meaning and application of *Baldasar v. Illinois*, 446 U.S. 222 (1980). Without a definitive ruling from this Court this confusion will get worse. The right to counsel under the Sixth Amendment to the United States Constitution and the right to due process of law under the Fourteenth Amendment to the United States Constitution cannot be allowed to mean different things depending upon in which state a person is arrested.

Respectfully submitted,

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APPENDIX
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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

Thomas James Chance, Appellant.

Appeal from Greenwood County
Sidney T. Floyd, Judge

Opinion No. 23376

Heard February 6, 1991 - Filed April 8, 1991

AFFIRMED

C. Rauch Wise, of Wise & Tunstall, of Greenwood for Appellant.

Attorney General T. Travis Medlock and Assistant Attorney General Harold M. Coombs, Jr., both of Columbia, and Solicitor W. Townes Jones, of Greenwood, for Respondent.

GREGORY, C.J.: Appellant was convicted of second offense driving under the influence (DUI). He was sentenced to a one year term of imprisonment and fined $2,000, suspended upon the service of two days, payment of $1,000, and probation for one year. We affirm.

Appellant pleaded guilty in 1980 to a prior DUI. This offense is within the ten-year period allowed for enhancement to

second offense DUI under S.C. Code Ann. § 56-5-2940 (Supp. 1990). Appellant was not represented by counsel at the 1980 plea nor does the record before us indicate appellant waived his right to counsel. Appellant was no incarcerated for the 1980 offense.[1]

Appellant relies on *Baldasar v. Illinois*, 446 U.S. 222, 100 S.Ct 1585, 64 L.Ed.2d 169 (1980), to argue that his prior uncounselled guilty plea cannot be used to enhance his punishment as a repeat offender absent the State's proof of a waiver of counsel. Thus, for the first time, this Court must fact the difficult task of interpreting the *Baldasar* decision.[2]

Baldasar was decided after the decision in *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.E.2d 383 (1979). *Scott* held that an uncounselled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The *Baldasar* court grappled with the issue whether a conviction valid under *Scott* may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute; the issue, however, was never resolved. The Court split four-to-four on this question and the fifty and deciding vote was cast on a different ground.[3]

Not surprisingly, state court decisions seeking to apply *Baldasar* have taken widely divergent views with no majority consensus. See e.g., *Commonwealth v. Thomas*, 510 Pa. 106, 507 A.2d 57 (1986) (valid for enhancement if no actual imprisonment and not subject to imprisonment for more than six months); *State v. Novak*, 107 Wisc. 31, 318 N.W.2d 364 (1982) (valid for

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[1] The statute in effect at the time allowed for punishment by a fine of fifty to one hundred dollars or imprisonment for ten to thirty days for first offense DUI. *S.C. Code Ann.* § 56-5-2940 (1976).

[2] In *State v. Canady*, ____S.C.____, 391 S.E.2d 248 (1990), we addressed a *Baldasar* claim but found it inapplicable because there was no enhanced punishment as a result of the prior conviction.

[3] Justice Blackmun concurred in reversal because he would find a right to counsel where the defendant is subject to imprisonment for six months or more. This test for right to counsel was rejected in *Scott*.

enhancement if not subject to imprisonment); *Sargent v. Commonwealth*, 5 Va.App. 143, 360 S.E.2d 895 (1987) (not valid for enhancement even if no actual imprisonment); *State v. Orr*, 375 N.W.2d 171 (N.D. 1985) (valid for enhancement if not punishable by imprisonment for more than six months.)

In seeking a logical application of the decisions of the United States Supreme Court, we conclude an uncounselled conviction constitutionally valid under *Scott* is valid for all purposes and therefore may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute. Accordingly, we hold when a defendant was not actually incarcerated for a prior uncounselled misdemeanor, that offense may be used for enhancement. The judgement of the circuit court is therefore.

AFFIRMED.

HARWELL, CHANDLER and TOAL, JJ., concurs. FINNEY, A.J., dissenting in separate opinion.

D I S S E N T

FINNEY, A.J.: I respectfully dissent. I would hold that a prior uncounselled conviction which did not result in incarceration may not be used to increase punishment under an enhanced penalty statute.

In affirming the circuit court, the majority concludes that an uncounselled conviction constitutionally valid under *Scott v. Illinois*, 440 U.S. 367 (1979), is valid for all purposes.

The United States Supreme Court held in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), that unless an accused has the guiding hand of counsel at every step in the proceedings against him, his conviction is no sufficiently reliable to support the severe sanction of imprisonment. Subsequently in *Scott*, supra, the Supreme Court held that counsel must be provided if a

prison term is actually imposed, not merely authorized. *Baldasar v. Illinois*, 446 U.S. 222 (1980), decided after *Scott*, supra, held that an uncounselled misdemeanor conviction is constitutionally valid if the offender in not actually incarcerated. The five justices is *Baldasar*, concurred, for differing reasons, that such a conviction may not be used to convert a subsequent misdemeanor into a felony with an enhanced prison term.

Apparently, the underlying consideration in these rulings is whether or not the accused would suffer an actual deprivation of personal freedom. In each instance, the uncounselled misdemeanor conviction was found to be constitutionally valid when no period of actual incarceration resulted therefrom. Hence, I would conclude that such a conviction may not form the basis for any subsequent incarceration.

"An uncounselled conviction does not become more reliable merely because the accused has been validly convicted for a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Baldasar*, 404 U.S. at 228 (Marshall, J. concurring).

In my opinion, an uncounselled first offense DUI guilty plea, which did not result in imprisonment, should not be used to convert a subsequent DUI conviction to a second offense DUI for the purpose of enhance punishment resulting in incarceration. I would reverse.

APPENDIX B

C. Rauch Wise, Esquire
408 Main Street
Greenwood, S.C. 29646

Re: The State v. Thomas James Chance

Dear Mr. Wise:

The court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/ George T. Gregory, Jr. C.J.
s/ David W. Harwell A.J.
s/ A. Lee Chandler A.J.
s. Jean H. Toal A.J.

"Petition for Rehearing
granted.

s/ Ernest A. Finney, Jr. C.J.

July 3, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenwood County.

Sincerely yours,

CLERK

CND,Jr./dmh

cc: The Honorable Harold M. Coombs, Jr.

Mr. Wise: And then we have the other question, the *Baldesar(sic) v. Illinois* question, which is the prior uncounselled DUI conviction which we contend cannot be used to enhance the punishment for this.

The Court: How about that?

Mr. Jones: Judge, It's a U. S. Supreme Court case, not a South Carolina Supreme Court.

Mr. Wise: Right. That gives me more ammunition, not less.

Mr. Jones: The point I'd like to make, judge, is that I'd like for them to give us a little bit more in the way of facts. I just don't have the records on his first offense. He says he didn't forfeit bond but rather was there.

Did he plead guilty, or did he contest it?

Mr. Wise: If you want him to testify, he will testify that he pled guilty, did not contest it, did not have a lawyer, and did not have the advice of a lawyer prior to the guilty plea.